

Office of Chief Counsel  
Internal Revenue Service

**memorandum**

CC:WR:NCA:SF

date: August 25, 2000

to: Jerry Li, Acting Appeals Chief  
San Francisco

from: Barbara M. Leonard, Acting District Counsel  
San Francisco

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subject: [REDACTED], Docket No. [REDACTED]

This memo is to provide advice regarding your contemplated action in the above-entitled case. The case of [REDACTED] has been in Appeals jurisdiction since [REDACTED]. The proposed deficiencies in this case exceed [REDACTED] dollars. Initially, Judge Foley had proposed a [REDACTED] trial date. In [REDACTED] Appeals informed the Petitioner that it intended to send the case to Counsel for trial preparation on [REDACTED] due, in part, to the need to meet the discovery and trial preparation deadlines to be imposed by the Court. Petitioner responded by seeking to continue the proposed [REDACTED] trial date. At Petitioner's request the Court declined to set a trial date and ordered that the parties submit quarterly status reports.

The first substantive settlement meeting with the taxpayer was held in [REDACTED]. At that meeting the Counsel litigation team participated in the discussion of the issues. Subsequent to that meeting the Petitioner requested that District Counsel attorneys not participate in the settlement meetings. As a result of that request, one of the Counsel attorneys who had been involved in the nondocketed stage of the case and is currently involved in a later audit cycle was excluded from the Appeals meetings with the Petitioner.

Counsel has expressed its desire to have full participation in the settlement meetings to advise Appeals regarding the law and facts in the case and to allow for adequate trial preparation. You have requested our advice on whether it is appropriate to condition further settlement consideration by Appeals upon full participation of Counsel in Appeals settlement meetings with the Petitioner. You would also like to have members of the Examination team present at your discretion. You have inquired as to whether such course of action would in any way subject you or your Appeals Officers to sanctions under Section 1203 of the Restructuring and Reform Act of 1998 ("RRA").

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For the reasons set forth below, we conclude that your contemplated actions are completely appropriate and in no way expose you or your Appeals Officers to risk of discipline under RRA Sec. 1203.

Section 1203(a) calls for the termination of employment of IRS employees as a sanction for certain proscribed conduct. Section 1203(b)(6) includes as proscribed conduct the violation of the Internal Revenue Code, Regulations, Manual or agency policy for purposes of retaliating against or harassing a taxpayer or his representative.

I.R.M. Sec. 8.4.1.1.2 and Rev. Proc. 87-24 set forth Appeals authority over docketed cases. Both state that in appropriate cases, such as those with significant issues or large proposed deficiencies, Counsel and Appeals may work together once a case is at issue. In such cases, Counsel is to act in an advisory capacity and may attend settlement conferences. I.R.M. 8.4.1.1.2, ¶ 5; Rev. Proc. 87-24, Sec. 2.06.

I.R.M. 8.4.1.1.2, ¶ 2 calls for the return of a case to Counsel's jurisdiction where settlement appears unlikely within a reasonable period of time. Further, both the manual and Rev. Proc. 87-24 call for return of a case to Counsel's jurisdiction where trial preparation, such as discovery, is needed. I.R.M. 8.4.1.1.2, ¶ 3; Rev. Proc. 87-24, Sec. 2.4.

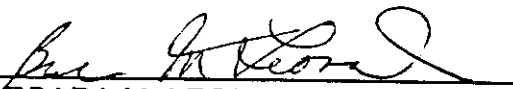
Sec. 1001(a)(4) of the RRA requires the Commissioner to formulate a plan to insure the independence of the Appeals function, including a preclusion of ex parte communication with other service employees to the extent it would appear to compromise the independence of the Appeals officer. To date, no plan has been implemented and there are no ex parte rules in place.

On [REDACTED], the Service issued a proposed Rev. Proc. dealing with the ex parte issue. Question 7 of the proposed Rev. Proc. states that the ex parte provision in no way alters the procedures for handling docketed cases as set forth in Rev. Proc. 87-24 and subsequent procedures. Cumulative Bulletin Notice 99-50, 1999-40 I.R.B.

In the instant case, Petitioner has objected to engaging in settlement discussions if the Counsel attorney who worked the case in the nondocketed stage is present. This attempted exclusion of an attorney knowledgeable concerning the facts and law in the case thwarts Appeals' accomplishment of its mission. Counsel's exclusion could lead to a possible distortion of the facts and/or law by Petitioner, thus hampering Appeals' ability to reach a fully informed and fair decision based on the merits of the case. Rev. Rul. 87-24 and I.R.M. 8.4.1.1.2 both contemplate and allow full Counsel participation. Counsel's participation is not restricted to attorneys who have not worked on the nondocketed stage of a case.

We reach a similar conclusion with respect to participation of the Examination agents in settlement meetings. The Petitioner argues that participation by the Examination agents at the Appeals meeting compromises the independence of Appeals under the RRA. However, this argument fails where the taxpayer is present at the meeting and fully able to address any position with respect to the facts or law proposed by the examination division to the Appeals officer. The independence of Appeals is well served by considering arguments and views from both sides of the table.

Thus, your proposed action is in full compliance with the law, manual provisions and policies of the Service and no sanctions under RRA Sec. 1203 would be appropriate.

  
BARBARA M. LEONARD  
Acting District Counsel  
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